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OF DUCKS AND DRAKES: JUDICIAL RELIEF IN REAPPORTIONMENT CASES

*Jo Desha Lucas**

In his dissenting opinion in *Baker v. Carr*, Mr. Justice Frankfurter said that to promulgate jurisdiction in the abstract in the setting of the apportionment controversies was "as devoid of reality as 'a brooding omnipresence in the sky,' for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary."¹ Mr. Justice Frankfurter is not suggesting that his brother Brennan is to ducks and drakes what Abner Doubleday was to baseball. Ducks and drakes is the game that is played whenever a court seeks to threaten, coax, and cajole a legislature into doing a thing which ultimately the court has no way of forcing it to do. The Court has played the game often, and in *Gomillion v. Lightfoot*² the invitation was issued by Mr. Justice Frankfurter himself.³ This he does not deny, for Mr. Justice Frankfurter was not suggesting that the Court give up the game altogether and return to the maxim: "Equity, like nature, does nothing in vain." Rather, it was his feeling that the federal courts' regular schedule of such games, forced upon it by the mandatory provisions of the Constitution, was already an exhausting one and should not be added to by rubberizing the equal protection clause to include a right to geographical equality in representation. Now that the invitation has been issued it is useful to review some of the basic rules of the game.

THE BIG LEAGUE: DUCKS AND DRAKES UNDER THE ORIGINAL JURISDICTION

In 1863, the United States admitted the State of West Virginia to the Union. The ordinance of the Wheeling convention of 1861⁴ giving consent of the "Restored State of Virginia" to the creation of the new state presumably was based on the understanding that West Virginia should assume a proper proportion of the outstanding obligations of the Commonwealth of Virginia, from which it was carved, as indeed the new state had promised it would. It was this undertaking which gave rise to the country's most celebrated game of ducks and drakes.

In 1906, forty-three years after the original undertaking, the amount due Virginia was still not agreed upon, and nothing had been paid. In that year Virginia brought an action in the Supreme Court of the United States to determine the amount and collect it. West Virginia demurred and the demurrer

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1 369 U.S. 186, 268 (1962).

2 364 U.S. 339 (1960).

3 The characterization of *Gomillion v. Lightfoot* in Judge Wisdom's concurring opinion in the United States Court of Appeals is strangely like Mr. Justice Frankfurter's dissent in *Baker v. Carr*. Judge Wisdom suggested that the only result which would flow from a declaration of invalidity would be a series of subsequent statutes and cases increasing the tension between the nation and state. *Gomillion v. Lightfoot*, 270 F.2d 594, 611 (5th Cir. 1959).

4 See *Virginia v. West Virginia* 206 U.S. 290, 315 (1907).

was overruled.⁵ The following year the matter was referred to a master.⁶ Four years later it was back before the Court. Mr. Justice Holmes, speaking for the Court said, "this case is one which calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end."⁷ That statement was made on March 6, 1911. On October 10, Virginia was back in court, requesting a final settlement of the matter upon the West Virginia legislature's failure to consider it during its 1911 extraordinary session. In dismissing the Virginia motion, Mr. Justice Holmes continued the game:

A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough that it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of the opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace."⁸

Two years later the Court granted West Virginia's motion for more time so that the work of the West Virginia debt commissioners could be completed. These commissioners had been appointed pursuant to a joint resolution adopted by the West Virginia legislature during its regular session of 1913.⁹ The following year West Virginia was permitted to file a supplemental answer and the matter was again referred to a master.¹⁰ Finally, in 1915, the Supreme Court rendered a judgment against West Virginia for the sum of \$12,393,929.50.¹¹

The following year, this judgment being unpaid, Virginia moved for writ of execution against West Virginia. Mr. Chief Justice White denied the motion, observing that the State of West Virginia should be given an opportunity to comply with the judgment.¹² The State of West Virginia had opposed the motion on three grounds: first, that the West Virginia legislature had not met since the rendition of the judgment, and no regular session was scheduled until January 1917; second, that the State had no property which was subject to execution; and third, though the Supreme Court is given jurisdiction to decide disputes between states, it has no power whatever to enforce judgments against a state. The Court, through Mr. Chief Justice White, denied the motion on the first ground asserted, and found it unnecessary to discuss the other two.

In 1917, while the West Virginia legislature was in session, but seemed to be doing nothing about the payment of the 1915 judgment, the Commonwealth of Virginia went back to the Court. This time, peculiarly enough, the

5 Virginia v. West Virginia, 206 U.S. 290 (1907).

6 Virginia v. West Virginia, 209 U.S. 514 (1908).

7 Virginia v. West Virginia, 220 U.S. 1, 36 (1911).

8 Virginia v. West Virginia, 222 U.S. 17, 19-20 (1911).

9 Virginia v. West Virginia, 231 U.S. 89 (1913).

10 Virginia v. West Virginia, 234 U.S. 117 (1914).

11 Virginia v. West Virginia, 238 U.S. 202 (1915).

12 Virginia v. West Virginia, 241 U.S. 531 (1916).

none-so-sovereign Commonwealth sought mandamus to the West Virginia legislature ordering that sovereign body to levy taxes sufficient to pay the Court's judgment of two years before.¹³ Service was made upon the president of the West Virginia Senate, the speaker of the West Virginia lower house, and all the members of both those sovereign bodies.

Precedents were understandably scarce, but Virginia argued that the power to render the judgment necessarily carried with it the power to enforce it. The Commonwealth contended that:

There is no magic in the word "sovereignty". . . . The power in this court in all cases in which it has jurisdiction over a State, is necessarily supreme. . . . This court cannot compel the exercise of discretion in a legislature; but it can compel the performance of a duty where such performance is necessary, in order that its decrees may not be treated as idle words. . . . It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of a mandamus is to be determined.¹⁴

Mr. Chief Justice White, speaking for a unanimous Court, was in complete agreement. "Mark, in words a common premise — a judgment against a State and the authority to enforce it — is the predicate upon which is rested on the one hand the contention as to the existence of a complete and effective, and the assertion, on the other, of limited and inefficacious power."¹⁵ After a discussion of the power of Congress to act to afford a solution, the Court stated:

The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and on the other hand it is contended that the duty to give effect to the judgment against the State, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel.¹⁶

Having said so much, however, the Court rapidly retreated to a bit of ducks and drakes cajolery:

But we are of the opinion that we should not now dispose of such question and should also now leave undetermined the further question, which, as a result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion, that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because, impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against

13 *Virginia v. West Virginia*, 246 U.S. 565 (1917).

14 *Id.* at 581-82.

15 *Id.* at 595.

16 *Id.* at 603-04.

a State and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a two-fold way having been also pointed out, we are fain to believe that, if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both the requirements of duty and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the case, but because of the character of the parties and the nature of the controversy — a contract approved by Congress and subject to be by it enforced — we should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.¹⁷

With this, the Court set the case down for reargument at the next term.

When the Commonwealth of Virginia filed its action in mandamus, the West Virginia legislature, being then in session, adopted a resolution authorizing appearance on its behalf, and further requesting the governor to call the legislature into special session whenever the decision of the Supreme Court should be rendered.¹⁸ When the decision was rendered, the legislature was not in session. It had gone through two special sessions in 1917, in neither of which it had had occasion to take up the Virginia debt problem,¹⁹ and the opinion of the Supreme Court, as we have seen, had indicated that that tribunal was not disposed to act finally on the matter until Congress could consider it. In the regular session of 1919, however, the West Virginia legislature adopted a resolution reciting the substance of the Supreme Court's opinion and the fact that issues had been narrowed by negotiation with the Commonwealth of Virginia, and accepting the Virginia settlement offer, thus vindicating the Court's position that postponement of final action would avoid the problem of providing specific mandatory relief.²⁰

Several observations may be made about judicial and legislative strategy in ducks and drakes as it was played in *Virginia v. West Virginia*. The first has to do with the preservation of the integrity of the judicial process. The Court *must* at all points insist that it has the *power* to enforce its judgment, obscuring, if possible, the way in which it might go about it. Thus, Mr. Chief Justice White affirmed the power of the Court to affect the governmental agencies of West Virginia, without deciding whether the matter was one which came within the ambit of mandamus jurisdiction; raised upon his own but did not decide the question of whether the Court could lay and collect a tax; mentioned that Congress could also intervene, and suggested that there might be other and unadumbrated methods of making the judgment stick. In short, he said that eventually the Court was going to have its way and that therefore everything

17 *Id.* at 604.

18 Acts of West Va., 1917, at 553-54.

19 It had found time for memorializing the fact that "Many of the most virile young men of West Virginia have 'rallied round the flag.'" Acts of West Va., 1917, 2d Extraordinary Session, at 74.

20 Acts of West Virginia, 1919, at 507.

would be more pleasant if, faced with this ultimate fact, West Virginia would go ahead and settle the claim.

On the part of the legislature, the tactics were also to avoid a direct confrontation by the Court. On its part, it conceded the validity of the judgment, kept in touch with Virginia in the hope of settling differences, but resisted the adjudication of the Court's power directly to compel it to act, to seize the State's property in execution, or to levy taxes on its citizens.

In the end, of course, West Virginia backed down and paid the judgment. As a matter of fact, it did not even delay its capitulation as long as the Supreme Court had indicated that it would tolerate delay, for it had been assured that the Court would not issue its mandate, or send in its assessors and collectors, until after Congress had had an opportunity to consider legislation providing for the collection of the amount due. Because of the capitulation of the West Virginia authorities, the question of the Supreme Court's power by mandamus to compel the West Virginia legislature to adopt revenue legislation, and its power directly to lay and collect taxes, were never finally determined. In a recent case the Supreme Court, speaking through Mr. Justice Harlan, spoke of the game as having had an inconclusive ending.²¹

Even if it were conceded that the Supreme Court of the United States, in enforcing a judgment rendered against a State in a case decided under the original jurisdiction, could or would issue its mandate to the members of a state legislature to coerce them into levying a tax sufficient in amount to pay the judgment, it does not follow that it would issue its mandate to compel the adoption of reapportionment legislation. The standard for legislation in the former is a plain one. The judgment was for precisely \$12,393,929.50, plus interest at five per cent from July 1, 1915, no more, no less.²² It is true that it was argued that there was still a discretion in the legislature in determining the methods it should employ in raising this sum, but at the time the main source of revenue was the property tax; and the state constitution could be read as providing for the levy of property taxes sufficient for the payment of the state's outstanding debts. The job of the Supreme Court in providing for the levy was, therefore, a purely arithmetic one. In any event, whatever the powers of the Supreme Court of the United States in cases under its original jurisdiction, that jurisdiction cannot be invoked in an apportionment case, for rights to equality of representation in a state legislature, whatever their extent, do not run to ambassadors, or to other public ministers and consuls; and under the Supreme Court's interpretation of the eleventh amendment, the state cannot be made a party to the litigation.²³ It is quite certain, then, that all the apportionment games will be begun in the minor leagues, the state and lower federal courts.

THE MINOR LEAGUES:

DUCKS AND DRAKES IN THE STATE AND LOWER FEDERAL COURTS

The first question which must be asked is whether the courts in the

21 *Glidden Company v. Zdanok*, 370 U.S. 530, 571 (1962).

22 *Virginia v. West Virginia*, 238 U.S. 202, 242 (1915).

23 *Ex Parte Young*, 209 U.S. 123 (1907); *Hans v. Louisiana*, 134 U.S. 1 (1889).

minor leagues can, with Mr. Chief Justice White, "Mark, in words a common premise" that complete and effective judicial power he saw in the Supreme Court of the United States. The state courts, in their relationship to their respective legislatures, are bound by their own constitutional limitations, and the lower federal courts are bound by statutes which spell out their jurisdiction and powers.

1. *Mandamus and Mandatory Injunction in the State Courts*

In 1926, in the case of *Fergus v. Marks*,²⁴ the plaintiffs requested the Supreme Court of Illinois to mandamus the Illinois General Assembly to enact apportionment legislation consistent with the requirements of the state constitution. The court refused to do so, indicating that the Constitution of Illinois vested the legislative power in the General Assembly and provided that neither the judiciary nor the executive departments should exercise that power.²⁵ For the court to issue its writ commanding the passage of legislation would violate that provision. The case was the subject of a note in the *Harvard Law Review*²⁶ which characterized it as the first American case in which such relief had ever been requested. The writer, noting that the majority of cases decided upon the question of whether the courts could by mandamus compel the governor to do his duty had been decided in the negative on separation of powers principles, went on to say that the case of the legislature "seemed" to fall a fortiori under these principles. Post-*Baker* state cases indicate that so still it "seems." In *Stein v. General Assembly*,²⁷ the Supreme Court of Colorado declined to issue its prerogative writ to the governor or to the legislature, and by way of dictum indicated that it had no power to do so. In *Sweeney v. Notte*,²⁸ the Supreme Court of Rhode Island came to the same conclusion, though it felt compelled to warn the legislature that if it continued to refuse to do its duty, some federal court would undoubtedly perform the task for it.

The refusal of the state courts to issue prerogative writs in such cases has once been before the Supreme Court of the United States. In *Anderson v. Jordan*²⁹ an original action in mandamus was brought in the Supreme Court of California to compel the California legislature to reapportion. It was dismissed without opinion. It was appealed to the Supreme Court of the United States, which dismissed the appeal.³⁰ In *Baker v. Carr*,³¹ Mr. Justice Brennan indicated that the refusal to grant a discretionary writ of this sort without any indication as to whether the refusal was grounded upon the constitutional question or not left the case one in which there was no showing of a necessarily decided federal question. Though the refusal of a state court to grant mandamus is reviewable in the Supreme Court, and there are cases in which such a refusal

24 321 Ill. 510, 152 N.E. 557 (1926).

25 ILL. CONST. art. III (1870).

26 40 HARV. L. REV. 137 (1926).

27 374 P.2d 66 (Colo. 1962).

28 183 A.2d 296 (R.I. 1962).

29 Unreported decision, see Statement as to Jurisdiction, *Anderson v. Jordan*, 343 U.S. 912 (1952).

30 343 U.S. 912 (1952).

31 369 U.S. 186, 235-36 (1962).

has been reversed,³² Mr. Justice Brennan's interpretation of the *Anderson* case, coupled with a lack of disposition on the part of state courts to claim the power to issue their prerogative writs to the governor and legislature of the state, leaves direct relief by mandamus in the state courts highly improbable.

2. *Mandamus and Mandatory Injunction in the Federal District Courts*

In one of the few references made to relief in the majority opinion in *Baker v. Carr*, Mr. Justice Brennan distinguished *Kidd v. McCanless*³³ by stating that the inability of a state court to give relief does not preclude relief in the federal courts. The doctrine of separation of powers which operates to limit a state court in its dealings with its own legislature is not strictly applicable to the relationship between the federal courts and the state legislature. Federal district courts, however, have no original jurisdiction in mandamus to compel state officials to do their duty.³⁴ They may compel federal officers in their duties,³⁵ and under recent civil rights legislation, in suits brought by the United States, may order state election officials to register voters.³⁶ This is the extent of their original jurisdiction in mandamus. Under the jurisdiction provided for in other sections, however, mandamus and mandatory injunction can be employed as ancillary devices. Often it is difficult to distinguish the difference. Thus in *Sipuel v. Board of Regents*,³⁷ the case was brought in the state courts, and the remedy sought was mandamus to register the plaintiff in the state university. The state supreme court refused the relief requested, and on appeal the Supreme Court reversed and directed that the mandate should issue.³⁸ In *Meredith v. Fair*,³⁹ on the other hand, the case was brought in the federal district court. Instead of requesting that the university officials be ordered to admit him, the plaintiff requested that they be enjoined from refusing to admit him, although his admission would obviously require positive acts on the part of the defendants. Yet the case was heard and decided on the merits.

Such relief has been prayed for in only one of the apportionment cases which have been brought in the federal district courts and reached the Supreme Court of the United States. In *Radford v. Gary*,⁴⁰ the plaintiffs requested a three-judge district court to mandamus the Governor of Oklahoma to assemble the legislature of the state, then to mandamus the legislature, once assembled, to reapportion the state consistent with the requirements of the equal protection clause, and, that failing, to mandamus the Supreme Court of Oklahoma to reapportion the state. Were this the only relief requested, the *Radford* case could easily be disposed of on the ground that the district court had no jurisdiction in mandamus. The original complaint, however, requested that state election officials be enjoined from holding elections under the then applicable

32 See, e.g., *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

33 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956).

34 See 1 MOORE, FEDERAL PRACTICE 243 (2d ed. 1961).

35 76 Stat. 744 (1962), 28 U.S.C.A. 1361 (Supp. 1962).

36 42 U.S.C. 1971(e) (Supp. III 1962).

37 *Sipuel v. Board of Regents of University of Oklahoma*, 199 Okla. 36, 180 P.2d 135 (1947).

38 *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

39 202 F. Supp. 224 (S.D. Miss.) *rev'd*, 305 F.2d 343 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

40 145 F. Supp. 541 (W.D. Okla. 1956).

reapportionment statute, and be ordered to hold elections at large for state legislators until such time as the legislature should adopt a constitutional reapportionment statute. There was also a general prayer for relief.⁴¹ During the proceedings, the plaintiff was permitted to amend the complaint and add as parties the State Auditor and the State Treasurer, and request that they be enjoined from paying the salaries and per diem allowances of the incumbent legislators.⁴² He also added a new general prayer:

Fourth: That plaintiff have all such relief as shall be necessary to effectuate his constitutional right to due process of law, and equal protection of the law, equal suffrage and equality of representation in the legislative department of the state of Oklahoma, as guaranteed by the Constitution of the United States, whether such relief be specifically prayed or not.⁴³

The district court dismissed the *Radford* case on the ground that it fell under the series of cases decided after *Colegrove v. Green*,⁴⁴ and that those cases precluded any form of relief.⁴⁵ Judge Wallace dissented. He was of the opinion that judicial consideration of state legislative malapportionment was not precluded by the *Colegrove* doctrine, and would have retained jurisdiction. With regard to the requested mandamus relief, however, Judge Wallace stated that it was his opinion that the district court obviously had no "right" to grant it.

Radford v. Gary takes on considerable importance in the discussion of relief in apportionment cases because a reference to *Radford* constitutes Mr. Justice Brennan's only clear reference, in *Baker v. Carr*, to particular forms of relief. Noting that the plaintiff had requested mandamus to the governor, the legislature, and the state supreme court, Mr. Justice Brennan stated that *Radford* was controlled by problems of relief.⁴⁶ If this statement be read together with the record in *Radford*, it is difficult to imagine what form of positive relief is left, for the court was asked for mandamus, injunction, an order to hold elections at large, injunction against payment of state funds, and whatever other relief the court might be empowered to afford. Such an interpretation of Mr. Justice Brennan's disposition of the *Radford* case would certainly take the teeth out of *Baker v. Carr*. It must be remembered, however, that he followed his statement to the effect that "problems of relief" governed by describing the case as affirming the district court's refusal to mandamus. Certainly he could not mean that the mere mention of that writ taints the whole complaint.⁴⁷ More probably he was characterizing the case as one involving mandamus only, a characterization which clearly is not borne out by the record, but one which involves no greater degree of blindness than was shown in the method of distinguishing several of the other numerous precedents which stood in the way of Mr. Justice Brennan's result in *Baker*.⁴⁸ This recognition of a need to distinguish *Radford*

41 See Jurisdictional Statement, *Radford v. Gary*, 352 U.S. 991 (1957), at vi.

42 145 F. Supp. at 542.

43 See Jurisdictional Statement, *Radford v. Gary*, 352 U.S. 991 (1957), at xi.

44 328 U.S. 549 (1946).

45 145 F. Supp. at 544.

46 *Baker v. Carr*, 369 U.S. 186, 236 (1962).

47 See generally FED. R. Civ. P. 8(a)(3) and 54(c). See also 1 MOORE FEDERAL PRACTICE 1207 (2d ed. 1961).

48 See Lucas, *Legislative Apportionment and Representative Government*, 61 MICH. LAW REV. 711, 713-41 (1963).

v. Gary does leave Mr. Justice Brennan's reference to its *ratio decidendi* somewhat ambiguous. At the very least, however, it stands for the proposition that federal district courts will not attempt by mandamus to compel state legislatures to enact apportionment legislation.

And even were this writ available, and even if it could be employed to compel governors and legislatures, and even if apportionment cases could be brought within the original jurisdiction of the United States Supreme Court, direct compulsion by mandamus or mandatory injunction would require the formulation of standards of fair apportionment of a degree of simplicity which so far the Court has shown no inclination to employ. Had the Court held that apportionment among extant geographical units must be made by simple division, like the spreading of the levy to raise the \$12,393,929.50 from among West Virginia property tax payers, there would be something finite to require the legislature to do. Problems of how to force them to do it remain. For while the entry of a student in a state university can be forced by sending marshals and troops to protect him, it taxes the imagination to conjure a vision of the marshals breathing down the necks of the members of the New York General Assembly while they parrot the requisite number of "ayes," or the prosecution for contempt of legislators who voted "nay" on the district court's apportionment bill.

Mandamus and Injunction to Election Officials

In the only other reference which majority members of the *Baker* court made to relief, Mr. Justice Douglas observed that "the respondents" could be ordered to eliminate the egregious injustices.⁴⁹ Since the respondents in *Baker* were election officials of the State of Tennessee,⁵⁰ presumably Mr. Justice Douglas thought that they could be ordered to reapportion the State of Tennessee without benefit of legislation. In this connection it should be noted that the cases which have come to the courts contesting the validity of apportionment legislation are not fungible. Certainly in some of them full relief can be given by injunction, or by mandamus or mandatory injunction. The case of congressional apportionment in a state which has lost representatives in the preceding census is a good example. In *Brown v. Saunders*,⁵¹ the Virginia Supreme Court of Appeals issued its mandate to election officials directing them to accept the plaintiff's notice of candidacy for the office of representative at large from Virginia. Virginia had lost a representative in the census of 1930, and the plaintiff contended that the subsequent Virginia reapportionment was in violation of the applicable Act of Congress, and of the state constitution.⁵² The same approach was attempted in *Smiley v. Holm*,⁵³ and was approved by the Supreme Court

49 *Baker v. Carr*, 369 U.S. 186, 250 n.5 (1962).

50 Named were the Secretary of State, Attorney General, Coordinator of Elections, and members of the State Board of Elections.

51 159 Va. 28, 166 S.E. 105 (1932).

52 The Virginia court noted the requirements of the Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13, but held that since the state constitution required apportionment according to population, it was unnecessary to rule on their constitutionality or applicability. See Amicus Brief by Attorney General of Virginia, *Wood v. Broom* 287 U.S. 1 (1932).

53 184 Minn. 228, 238 N.W. 494 (1931).

of the United States.⁵⁴ This was an easy case, however, for a federal statute provided that where a state loses representation and fails to adopt legislation reapportioning congressional districts, the representatives from that state shall be elected at large. It remained only to declare the apportionment statute invalid, and the legal duty to conduct the election at large followed automatically.⁵⁵

The recent case of *Gray v. Sanders*⁵⁶ was also an easy one in terms of relief. The Georgia law governing party primary elections was complete without the sections providing for counting the vote on the basis of county units.⁵⁷ The court could therefore enjoin election officials from counting the votes that way, and order them to count them on a state-wide basis. The case is also quite different in that the standard adopted by the Supreme Court was a simple one man-one vote standard. This difference between the unit vote cases and the legislative apportionment cases was recognized and argued in the earlier attempts to invalidate the Georgia primary laws, and was relied upon by Mr. Justice Douglas in his dissenting opinion in *South v. Peters*.⁵⁸

In *Scholle v. Hare*,⁵⁹ as well, the Michigan court simply invalidated an amendment to the state constitution providing for fixed state senate districts, with the result that the previous constitutional provision requiring reapportionment according to population was revived. Indeed, even where there is no earlier provision to fall back upon, the courts could invalidate a state constitutional provision dealing with apportionment, leaving the state legislature to apportion itself under its general grant of legislative power. This is the device which was employed by the Maryland courts in the *Tawes* case.⁶⁰ Where the legislature is left to apportion itself free from guides set out in the state constitution, presumably it may do so in any way it sees fit, within whatever limits may eventually develop under the equal protection clause.

This difference between easy and difficult cases was recognized by Mr. Justice Frankfurter in his opinion in *Gomillion v. Lightfoot*.⁶¹ The city of Tuskegee had legal boundaries prior to the enactment of the statute which converted it into a "sea dragon." When in *Gomillion* the Court invalidated that statute, the boundaries of the city reverted to what they had been, a square. No legislation was required. The court's judgment gave complete relief.

But Mr. Justice Douglas was correct in pointing out that *Gomillion* was as plain an invitation to play at ducks and drakes as was *Baker*,⁶² for in this

54 *Smiley v. Holm*, 285 U.S. 355 (1932), reversing 184 Minn. 228 (1931). See *Koenig v. Flynn*, 258 N.Y. 292, 179 N.E. 705 (1932), *aff'd*, 285 U.S. 375 (1932); and *Carroll v. Becker*, 329 Mo. 501, 45 S.W.2d 533 (1932), *aff'd*, 285 U.S. 380 (1932).

55 2 U.S.C. § 2a(c) (1958).

56 *Gray v. Sanders*, 372 U.S. 368 (1963).

57 GA. CODE ANN. §§ 34-3201 to -3238 (1962).

58 339 U.S. 276, 277 (1950).

59 367 Mich. 176, 116 N.W.2d 350 (1962), *petition for cert. filed sub nom. Beadle v. Scholle*, 31 U.S.L. WEEK (U.S. Oct. 15, 1962) (No. 517).

60 *Md. Comm. for Fair Representation v. Tawes*, 228 Md. 412, 180 A.2d 656, 669-71 (1962).

61 364 U.S. 339 (1960).

62 See *Wisdom, J.*, concurring in *Gomillion v. Lightfoot* 270 F.2d 594, 611 (5th Cir. 1959). See *Lucas, Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUPREME COURT REVIEW 194. Douglas made this observation in *Baker*, 369 U.S. at 250, n.5.

game most of the easy cases can, at the state legislature's option, be converted into difficult ones. Thus, in the Georgia county unit vote case, Georgia law does not require that any party must hold a primary election. Parties are free to nominate by state convention. Were the party to decide to nominate by convention, the case would be translated into one dealing with standards of representation in party nominating conventions, one expressly ducked by the Supreme Court in the litigated case. Suppose, indeed, that the Georgia legislature should provide that nominations shall be made by a state convention, and further, that delegates to the convention shall be elected from each county, or, to make the parallel complete, each county shall elect a number of delegates equal to its representation in the legislature, and further, that delegates shall run as pledged to particular candidates. In such a system there would be a one man-one vote relationship in every single jurisdiction in which a vote is taken, but the allotment of political influence would be identical to that under the system invalidated in *Gray v. Sanders*.

In *Scholle v. Hare*, as well, once the offending constitutional provision was eliminated, the case reverted to a case of failure of the legislature to apportion according to the requirements of the state constitution, the most difficult of all cases as far as relief is concerned. Were the provisions in the new Michigan Constitution invalidated, the court would face the same difficult task of forcing a legislature to do its bidding.

Declarations of Invalidity and their Consequences

At the very least, *Baker v. Carr* must mean that a court can rule upon the constitutionality of existing schemes of legislative apportionment and declare such schemes invalid. In the days of mounting editorial attack on the doctrine of judicial nonintervention, it was sometimes urged that even if there were no effective method of giving relief against malapportionment, the courts should not refrain from giving declaratory judgments. This argument rested upon two grounds. The first was probability. It was said that one should not presume that public officials who have sworn to do their duty will not do it once it has been judicially defined. The troublesome problem of forcing them to do their duty should simply await the unpleasant, though improbable event. The other rested upon the characterization of the judicial process as educational as well as compulsive. At the very least courts should instruct the other coordinate departments of the government in the true meaning of the Constitution even in those cases in which its articulation is ultimately left to others.⁶³ Though this view of the judicial function was roundly scored by Mr. Justice Frankfurter in his *Baker* dissent,⁶⁴ it appears to have had a nod of approval from his brother Douglas, who observed that a court's "conclusion that reapportionment should be made may itself stimulate legislative action,"⁶⁵ citing the experience in

63 See Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1097 (1958): "What [courts] have to offer is chiefly their educational and moral influence."

64 *Baker v. Carr*, 369 U.S. 186, 269-70 (1962): "This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief. . . ."

65 *Id.* at 250 n.5.

*Asbury Park Press v. Woolley*⁶⁶ and *Magraw v. Donovan*.⁶⁷ But courts are notably reluctant to observe disregard of their teaching, or to concede that their solemn declaration of invalidity is nothing more than hortatory; even if it were, its effect would be materially lessened by the concession.

In *Kidd v. McCanless*,⁶⁸ the Supreme Court of Tennessee had declined to declare the Tennessee Reapportionment Act of 1901⁶⁹ invalid, on the ground that under the Tennessee law of *de facto* officers a person cannot be an officer *de facto* after a judicial declaration that he is not an officer *de jure*. If the court were to declare the reapportionment act unconstitutional, it said, there would be no legal legislature, even for the purpose of adopting constitutional reapportionment legislation, and the state would be in chaos.⁷⁰ In *Baker v. Carr*, Mr. Justice Brennan shrugged off the Supreme Court's dismissal of the appeal in *Kidd* by observing that the inability of the state court to give relief does not preclude relief in the federal courts.⁷¹ Mr. Justice Douglas commented that the Tennessee Supreme Court's view of the law of *de facto* officers was clearly wrong, citing an Iowa case to prove it.⁷² On remand of *Baker*, the United States District Court was nervous about the Tennessee Supreme Court's prediction of chaos. It suggested that perhaps it wouldn't be bound by the Tennessee view of the law of *de facto* officers; but just to make sure, it withheld its declaration that the remedial apportionment statutes enacted in 1962 were invalid, and held that for purposes of enacting valid apportionment legislation the incumbents would by the court's decree be acting in good faith.⁷³

Assuming that this novel play gave the court a few points, and indeed that the legislature, no doubt radiating good faith, did amend the 1962 apportionment statutes, it would not end the game. The 1962 statutes, though described as better than the old one, did not meet the court's notion of the requirements of the equal protection clause, and under the decree of prospective invalidity, presumably, if the 1963 legislature does not meet those requirements the end of its term will raise the same issue, unless perhaps the District Court gives it a new injection of good faith.

No court so far has been willing to turn an apportionment dispute into a general jail delivery by permitting collateral attack upon statutes enacted by a legislature allegedly malapportioned. This was tried in Indiana, in an attack upon the Indiana gross income tax statute. It was alleged that since the act was adopted by an unconstitutionally apportioned legislature, it was invalid and its operation should be enjoined. The United States District Court rejected this contention in *Matthews v. Handley*.⁷⁴ In that case, however, the question was one of whether collateral attack on statutes would be permitted as a method

66 33 N.J. 1, 161 A.2d 705 (1960).

67 170 F. Supp. 803 (D. Minn. 1959), *dismissing for mootness* 163 F. Supp. 184 (D. Minn. 1958).

68 200 Tenn. 273, 292 S.W.2d 40, *appeal dismissed*, 352 U.S. 920 (1956).

69 Acts of the State of Tennessee, 1901, ch. 122.

70 200 Tenn. 273, 292 S.W.2d 40, 43 (1956). See Dixon, *Apportionment Standards and Judicial Power*, *supra*, at 367, 388-89.

71 369 U.S. 186, 236 (1962).

72 *Id.* at 250 n.5; citing *City of Cedar Rapids v. Cox*, 252 Ia. 948, 964, 108 N.W.2d 253, 262-63 (1961).

73 *Baker v. Carr*, 206 F. Supp. 341, 350 (M.D. Tenn. 1962).

74 179 F. Supp. 470 (N.D. Ind.), *aff'd*, 361 U.S. 127 (1959).

of seeking a declaration of invalidity. Were the declaration of invalidity to come first, the Tennessee view of *de facto* officers raises the specter of invalidity of legislation adopted after the judicial declaration.

After holding that the Virginia reapportionment statute was unconstitutional, the United States District Court for the Eastern District of Virginia has enjoined the holding of elections under its provisions.⁷⁵ On the surface this was a bold stroke, for once elections are enjoined, and the tenure of the present legislature runs out, there is no legislature to reapportion, and as the Supreme Court of Tennessee said, the state is in chaos. It was not quite so bold as it looked, however, for Virginia is one of the few states in which the legislature convenes in even numbered years. The present legislature was elected in 1961, and met in regular session in 1962. The next legislature is to be elected in November, 1963, with the primary election to be held in July. The court's order was handed down on November 28, 1962, a year before any election was scheduled, and five months before any declaration of candidacy need be filed for the primary election. The order was stayed for two months to enable the General Assembly to meet in special session. The court showed its hand, however, when it said, "Meanwhile jurisdiction of the cause will be retained, but any further stay of the injunction must be sought from the Supreme Court or one of its Justices. If neither of the steps just mentioned is taken or, if taken, does not result either in meeting or altering our decision, then the plaintiffs may apply to this court for such further orders as may be required."⁷⁶ The defendants did, of course, apply for further stay, and it was granted by Chief Justice Warren. The filing date for the Virginia July primary elections has now passed, and the Supreme Court has recently noted probable jurisdiction of the appeal from the District Court's decision.⁷⁷ Thus it seems probable that the Virginia General Assembly has successfully employed a time-honored ducks and drakes defensive play. It should be noted that the Virginia State Senate is elected every four years, and was last elected in 1961. Since there will be no new Senate election until 1965, presumably the injunction would not affect the present Senate membership until it had had the opportunity to participate in the consideration of any apportionment legislation which would be introduced in the 1964 regular session. Thus, even if the District Court's injunction were reinstated in time to prevent the 1963 elections for members of the House of Delegates, the Senate is in a position to fight for a compromise before its time runs out. This seems to be ducks and drakes played with great finesse. The District Court has done its duty, even to the extent of giving drastic relief; but the relief has been stayed, and in all likelihood there will be ample time for full play of political forces before there is any final resolution of the pattern of legislative representation in Virginia.

So we see that by and large the lower federal courts in the post-*Baker* cases have adopted the big league ducks and drakes techniques. Speak sternly, assert power, show extreme reluctance to intervene, but grave concern, and, above all, provide an actual order which allows plenty of time for political forces to

⁷⁵ *Mann v. Davis*, 213 F. Supp. 577 (E.D. Va. 1962).

⁷⁶ *Id.* at 586.

⁷⁷ *Davis v. Mann*, *prob. juris. noted*, 31 U.S.L. WEEK 3404 (U.S. June 10, 1963) (No. 797).

act, hoping the while that you will never have to face the problem of positive relief. The assumption underlying this strategy is that urban political forces are generally powerful enough to drive a legislative bargain, once they are armed with a judicial declaration of rights. The corollary is that in this way the courts will be spared the necessity of a showdown. In a recent article in the *Supreme Court Review*, *Baker v. Carr* was referred to as "Politics in Search of Law."⁷⁸ The process by which it is implemented may aptly be called "Law in Search of Politics."

⁷⁸ Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REVIEW 252.